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IN THE

Supreme Court of the United States

Term,

No. 74-1093

IN RE: ESTATE OF GILBERT F. RILEY, Deceased, Late of the Borough of Hollidaysburg, County of Blair and Commonwealth of Pennsylvania.

APPEAL OF RUSSELL J. RILEY, EARL V. RILEY, FRANCIS RILEY, MRS. MARGARETTA BURKE, MARSHELL MINE, MARCELINE RILEY, LEROY RILEY, HELEN HOUSUM, ROBERT RILEY, FRED SOCIE, MELVIN SOCIE, MRS. GERALDINE PACKER, Intestate heirs of Gilbert F. Riley, deceased,
Petitioners.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

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APPEAL OF RUSSELL J. RILEY, EARL V. RILEY, FRANCIS RILEY, MRS. MARGARETTA BURKE, MARSHELL MINE, MARCELINE RILEY, LEROY RILEY, HELEN HOUSUM, ROBERT RILEY, FRED SOCIE, MELVIN SOCIE, MRS. GERALDINE PACKER, Intestate heirs of Gilbert F. Riley, deceased,

Petitioners.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

Russell J. Riley, Earl V. Riley, Francis Riley, Mrs. Margaretta Burke, Marshell Mine, Marceline Riley, Leroy Riley, Helen Housum, Robert Riley, Fred Socie, Melvin Socie, Mrs. Geraldine Packer, being the intestate heirs of Gilbert F. Riley, deceased, hereby petition that a Writ of Certiorari issue to review the judgment of the Supreme Court of Pennsylvania entered in this case on December 5, 1974.

I. Opinions Below

The opinion of the Supreme Court of Pennsylvania in this case at No. 447 January Term 1973 decided December 5, 1974 (Appendix A) is not reported.

The opinion of the Supreme Court of Pennsylvania in *Estate of Cavill* at No. 1 March Term 1974 decided December 5, 1974 (Appendix B) is not yet reported.

The opinion of the Common Pleas Court of Blair County, Pennsylvania at No. 220 D.C. 1972 decided June 11, 1973 (Appendix C) in which said Court found Section 7(1) of the Pennsylvania Wills Act in violation of the First and Fourteenth Amendments of the United States Constitution is not reported.

II. Jurisdiction

The jurisdiction of this Court to review the judgment of the Supreme Court of Pennsylvania by Writ of Certiorari is conferred by Act of Congress, June 25, 1948, c. 646, 62 Stat. tit. 929; 28 U. S. C. § 1257(3). The judgment of the Supreme Court of Pennsylvania was entered December 5, 1974 (Appendix A). This petition is filed within 90 days of the latter date.

III. Question Presented

Is Section 7(1) of the Pennsylvania Wills Act repugnant to the rights of equal protection of law guaranteed by the Fourteenth Amendment to the Constitution of the United States?

IV. Constitutional and Statutory Provisions Involved

1. United States Constitution.

   a. Amendment XIV, Section 1.

   > All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. Statutory Provisions.

   a. Pennsylvania Wills Act, Act of 1947, April 24, P.L. 89 § 7 as amended 1970, April 22, P.L. ____ No. 98 § 1: 20 P.S. § 180.7.

   > (1) Death within thirty days.—Religious and charitable gifts. Any bequest or devise for religious or charitable purposes included in a will or codicil executed within thirty days of the death of the testator shall be invalid unless all who would benefit by its invalidity agree that it shall be valid. The thirty-day period shall be so computed as to include the day on which the will or codicil is written and to exclude the day of death. Unless the testator directs otherwise, if such a will or codicil shall revoke or supersede a prior will or codicil executed at least thirty days before the testator's death, and not theretofore revoked or superseded and the original of which can be produced in legible condition, and if each instrument shall contain an identical gift for substantially the same religious or charitable purpose, the gift in the later will or codicil shall be valid; or if each instrument shall give for substantially the same religious or charitable purpose a cash legacy or a share of the residuary estate or a share of the same asset, payable immediately or subject to identical prior estates and conditions, the later gift shall be valid to the extent to which it shall not exceed the prior gift.

As set forth above, the Pennsylvania Wills Act permits the avoidance of testamentary bequests for religious or charitable purposes made within 30 days of death. Statutes similar to this are in effect in various states and are referred to as "Mortmain Acts".[1]

The Last Will and Testament of Gilbert F. Riley was executed on November 10, 1969 and contained the following residuary clause:

> "ITEM IV: All the rest, residue and remainder of my estate, of whatsoever nature and character and wheresoever situate, including that over which I may have the power of disposition, and including all cash, securities, stocks and bonds, I do hereby give, devise and bequeath unto the *PASTOR OF ST. MICHAEL'S ROMAN CATHOLIC CHURCH OF HOLLIDAYSBURG, PENNSYLVANIA*, to be used in whatever way he deems fit and proper and for the benefit of both St. Michael's Church and School."

Gilbert F. Riley died on November 30, 1969 within 30 days of the execution of his Will and the provisions of the Pennsylvania Wills Act were invoked by his intestate heirs. Subsequent to an auditor's report upon matters no longer at issue in this case the Court of Common Pleas of Blair County, Pennsylvania ordered distribution of the decedent's residuary estate to the intestate heirs.

On December 14, 1972, the Court of Common Pleas of Blair County granted a reargument of the case on the basis of a decision rendered by the U.S. District Court for the District of Columbia in *In Re: Small*, Adm. No. 2507-70, Vol. 109, No. 47, Washington Law Reporter 453 (1972).

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[1] See: Calif. Probate Code, § 40 to 43; D. C. Code 1951 § 19-202; Fla. Stats. Ann. § 731.19; Ga. Code Ann. § 113-107; Idaho Code 1947, § 14-326; Miss. Constitution, § 270; Code 1942, § 671; Mont. Rev. Codes 1947, § 91-142; Ohio Rev. Code, § 2107.06.

statute of the District of Columbia similar to that in effect in Pennsylvania, violative of rights of religious liberty granted under the First Amendment to the Constitution of the United States. By opinion and order dated June 11, 1973, the Court of Common Pleas of Blair County held that the statute in effect in Pennsylvania as heretoabove set forth was invalid in that it violated the "free exercise clause" of the First Amendment to the Constitution of the United States and the "due process clause" of the Fourteenth Amendment to the Constitution of the United States (Appendix C). This order and opinion were appealed by the within petitioners to the Supreme Court of Pennsylvania and on December 5, 1974, such Court, by order and reference to an opinion in a companion case *In Re: Carill Estate*, also dated December 5, 1974 (Appendix B) held that the statute of the Commonwealth of Pennsylvania in question was invalid in that it violates the "equal protection clause" of the Fourteenth Amendment to the Constitution of the United States (Appendix A).

The Federal questions relating to the "free exercise clause" of the First Amendment to the Constitution of the United States were first raised in this case by the residuary beneficiaries' petition for reargument to the Court of Common Pleas of Blair County, Pennsylvania (Appendix D). The "due process clause" of the Fourteenth Amendment to the Constitution of the United States was first raised at the argument before the Court of Common Pleas of Blair County, Pennsylvania. The "equal protection clause" of the Fourteenth Amendment to the Constitution of the United States was first raised by the Supreme Court of Pennsylvania, and was the sole basis for the final opinion and order of the latter Court. (See Appendix A, p. 2, n. (1)).

VI. Reasons for Granting a Writ of Certiorari

The Supreme Court of Pennsylvania has, in this case, decided a substantial constitutional question relating to the rights of the state to determine the manner of testamentary disposition of property. The specific issue involved in this case has not previously been decided by this Court and is significant not only in Pennsylvania but in various other states.

The petitioners believe that the decision of the Supreme Court of Pennsylvania in this case is contrary to a number of cases in which this Court has upheld the exclusive right of the state to determine the manner of testamentary disposition.

It has generally been stated that:

> "A person must devise or bequeath his property in accordance with and subject to the conditions and limitations provided by statute; otherwise he cannot bequeath it at all. While the right to dispose of property by will is one which has prevailed generally among civilized peoples in all ages, each country or state has the right to regulate the exercise of testamentary power by imposing conditions and prescribing the circumstances under which a will may be made, and limiting the class of persons entitled to make a will, or even to withhold or take away the privilege of making a will," 57 *Am Jur Wills* § 52, page 75.

This Court has consistently held that:

> "part of the residue of sovereignty retained by the states, a residue insured by the Tenth Amendment, is the power to determine the manner of testamentary transfer of a domiciliary's property and the power to determine who may be made beneficiaries." *U.S. v. Burnison*, 339 U.S. 87, 94 L. Ed. 675 (1960), 339 U.S. 91, 94 L. Ed. 681.

Furthermore, this Court has held that *nothing* in the Federal Constitution forbids the legislature of a state to limit, condition or even abolish the power of testamentary disposition under property within its jurisdiction. *Irving Trust Co. v. Day*, 314 U.S. 566, 86 L.Ed. 452, (1942) [Emphasis supplied]. See also *United States v. Fox*, 94 U.S. 315, 24 L.Ed. 192, (1877); *United States v. Perkins*, 163 U.S. 625, 41 L.Ed. 287, (1896); *Plummer v. Coler*, 178 U.S. 115, 44 L.Ed. 998, (1900); *Maxwell v. Bugbee*, 250 U.S. 525, 63 L.Ed. 1124, (1919); *Lyeth v. Hoey*, 305 U.S. 188, 83 L.Ed. 119 (1938).

Moreover, the residuary beneficiary of the decedent's will has no vested right in the disposition of decedent's property. 16 *C.J.S. Constitutional Law*, § 225, p. 1189.

This Court has most recently upheld the right of the states to distinguish between classes of heirs in the case of *Labine v. Vincent*, 401 U.S. 532, 28 L.Ed. 2d 288 (1971), and petitioners believe that the decision of the Supreme Court of Pennsylvania is contrary to this Court's decision in that case.

The decision in this case, therefore, represents the usurpation by a state court of a legislative function in disregard of the limits established by this Court for such intervention. See *San Antonio School District v. Rodriguez*, 411 U.S. 1, 40, 36 L.Ed. 2d 16, 47 (1973); *Shapiro v. Thompson*, 394 U.S. 618, 661, 22 L.Ed. 2d 600, 631 (1969) (dissenting opinion of Mr. Justice Harlan).

Even if judicial intervention is acceptable, such statute is based upon the reasonable concern of protecting family members of the decedent, which is a proper rational for state action. *Labine v. Vincent, supra.*

The decision of the Supreme Court of Pennsylvania in this case is based not upon a finding that a rational basis fails to exist but upon the conclusion that the section is so imprecisely drawn as to allow occasional arbitrary results. Such a requirement for mathematical precision in statutory language is contrary to the guidelines established by this Court. *Dandridge v. Williams*, 397 U.S. 471, 484, 25 L.Ed. 2d 491, 501 (1970), cf., *Harper v. Virginia Board of Education*, 383 U.S. 663, 670, 16 L.Ed. 2d 169, 174 (1966). It is merely sufficient that the classification scheme be *reasonably* related to the legislative objective. *Morey v. Dard*, 354 U.S. 457, 465, 1 L.Ed. 2d 1485, 1491 (1957).

Petitioners believe that if the Pennsylvania Wills Act sets forth any classification, such classification is reasonably related to a proper legislative objective.

VII. Conclusion

For the foregoing reasons, it is respectfully requested that this Court should grant this Petition for a Writ of Certiorari to review the Judgment of the Supreme Court of Pennsylvania.

Respectfully submitted,

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APPENDIX "A"

Opinion in the Supreme Court of Pennsylvania—Eastern District

[J-361]

IN THE

SUPREME COURT OF PENNSYLVANIA

EASTERN DISTRICT

IN RE ESTATE OF GILBERT F. RILEY, deceased.

APPEAL OF RUSSELL J. RILEY, *ET AL.*

No. 447 January Term, 1973.

APPEAL FROM THE ORDER DATED JUNE 11, 1973 OF THE COURT OF COMMON PLEAS OF BLAIR COUNTY, PENNSYLVANIA, ORPHANS COURT DIVISION AT No. 220 O.C. 1972.

OPINION.

PER CURIAM: Filed: December 5, 1974.

Appellants are intestate heirs of the late Gilbert Riley, who, 20 days before his death, bequeathed the residue of his estate to St. Michael's Roman Catholic Church of Hollidaysburg. Appellants, by filing timely objections to the executor's First and Final Account, sought to prevent distribution to the Church on the ground that such distribution would be contrary to the Pennsylvania Mortmain Statute, Act of April 24, 1947, P. L. 89, § 7 as amended,

Appendix "A"—Opinion in the Supreme Court of Pennsylvania—Eastern District

Act of April 22, 1970, P. L. ____, No. 98, § 9, 20 P. S. § 180.7. The auditor sustained appellants' objections after a hearing. Exceptions to the auditor's report were filed on behalf of the Church. By order of August 25, 1972, the lower court dismissed the exceptions and confirmed the auditor's recommendation and proposed distribution. On September 21, 1972, appellees requested reconsideration and reargument of the lower court's order on the basis of a decision of the United States District Court for the District of Columbia, *In Re:* Small, which was decided February 7, 1972. There the District Court held that the Mortmain Statute in the District of Columbia violated the First Amendment. The lower court granted the request for reargument and appellees then proceeded to attack the statute on the basis of the First Amendment and on Fourteenth Amendment due process grounds. The lower court held that the statute did violate the First Amendment and the due process clause and ordered that distribution be awarded to the trustee of the Church. This appeal followed.

Appellants allege that the trial judge erred first in granting reargument and second in holding that the Act of 1947 is unconstitutional.

Although the principle of finality is to be well guarded by our courts, we cannot agree with appellants' position that the principle has been unjustly served in the circumstances of this case. The request for a reargument was made within a reasonable period of time and before the time for filing an appeal had expired, see Rule 1522 of the Pa. Rules of Civil Procedure. Where the lower court has

attempted to bring all the facts and relevant law before it upon petition for rehearing filed within the appropriate period of time we can only command the lower court on its attempt to insure the just and comprehensive resolution of the case.

As to the merits of the ruling below, we affirm the lower court on the basis of our opinion in the case of *Estate of Cavill*, ____ Pa. ____, ____ A.2d ____ [J-247, 1974, filed this day].[1]

Decree affirmed.

Mr. Justice POMEROY filed a Dissenting Opinion in which Mr. Justice EAGEN joined.

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[1] Although the lower court did not invalidate the Mortmain Statute on equal protection grounds as we have done in *Cavill*, the decree must nevertheless be affirmed where the action of the lower court is correct even where an incorrect reason is assigned. *International Union of Operating Engineers, Local No. 66, AFL-CIO v. Linesville Construction Co. & Utility Constructors, Inc.*, ____ Pa. ____, ____ A.2d ____ [J-163, 1974]; *Sherwood v. Elgart*, 383 Pa. 110, 117 A.2d 899 (1955). In view of the *Cavill* decision, we need not consider the constitutional grounds discussed by the court below.

Appendix "A"—Opinion in the Supreme Court of Pennsylvania—Eastern District

[J-361]

IN THE

SUPREME COURT OF PENNSYLVANIA

EASTERN DISTRICT

IN RE ESTATE OF GILBERT F. RILEY, deceased.

APPEAL OF RUSSELL J. RILEY, *ET AL.*

No. 447 January Term, 1973.

APPEAL FROM THE ORDER DATED JUNE 11, 1973 OF THE COURT OF COMMON PLEAS OF BLAIR COUNTY, PENNSYLVANIA, ORPHANS COURT DIVISION AT No. 220 O.C. 1972.

DISSENTING OPINION.

POMEROY, *J.* Filed: December 5, 1974.

For the reasons set forth at length in my dissenting opinion in *Estate of Cavill,* filed this day, ____ Pa. ____, ____ A.2d ____ (1974), I dissent also from the affirmance of the decree in the case at bar.

MR. JUSTICE EAGEN joins in this dissent.

APPENDIX "B"

Opinion in the Supreme Court of Pennsylvania—Western District

[247]

IN THE

SUPREME COURT OF PENNSYLVANIA

WESTERN DISTRICT

IN THE MATTER OF THE ESTATE OF LEONA E. CAVILL, DECEASED.

ERNESTINE MITCHELL, CHARLOTTE VICKERS, now FLICK, RICHARD STOLZ, DALE STOLZ, ZOE SCHNEIDER, FRANCIS (BUD) STOLZ, MERCEDES STRELECKI, THEODORE G. STOLZ, DONALD L. STOLZ, and MARJORIE STOLZ,

Appellants.

No. 1 March Term, 1974.

APPEAL FROM THE DECREE OF THE COURT OF COMMON PLEAS OF ERIE COUNTY, ORPHANS' DIVISION, ENTERED JUNE 4, 1973 AT NO. 28, MAY LIST 1960.

OPINION OF THE COURT.

ROBERTS, *J.* Filed: December 5, 1974.

On October 31, 1957, twenty-four days prior to her death, Leona E. Cavill executed her last will and testament. In an audit statement, filed pursuant to the first and final

account, decedent's executrix requested a hearing on the applicability of section 7(1) of the Wills Act of 1947[1] to the final dispositive paragraph of the will. That paragraph directs that the residue of decedent's estate be divided among five named charitable organizations.[2] A supplemental account showing $100,750.97 in the estate was filed in 1972, and the account was called for audit.[3]

The orphans' court held that the residuary estate should be distributed to the five charitable organizations named

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[1] Act of April 24, 1947, P.L. 89, § 7(1). The relevant portion of § 7(1) states:

> "Any bequest or devise for religious or charitable purposes included in a will or codicil executed within thirty days of the death of the testator shall be invalid unless all who would benefit by its invalidity agree that it shall be valid."

This section was amended by the Probate, Estates and Fiduciaries Code, 20 Pa. S. § 2507(1) (Special Pamphlet 1974) (effective July 1, 1972). However, because testatrix died while the 1947 Act was in effect, the orphans' court properly applied that Act. See *Carill Estate*, 56 Erie County Legal J. 44, 45 n.1 (Pa. O.C. 1973) (Dwyer, P.J.). Since section 7(1) and section 2507(1) are identical in effect, our analysis of section 7(1) is equally applicable to section 2507(1).

[2] The residuary clause reads:

> "TENTH: All the rest, residue and remainder of my estate, whether real, personal or mixed, of whatsoever kind or nature and wheresoever situate at the time of my decease, I give, devise and bequeath unto The American Heart Association; The American Cancer Society Incorporated; The American Foundation for the Blind; Boys Town of Boys Town, Nebraska; and Zem Zem Hospital for Crippled Children, of Erie, Pennsylvania, to be equally divided among them, share and share alike."

[3] Notice of the hearing was given to the five charities, the decedent's intestate heirs, and the Attorney General of the Commonwealth.

The charities argue that the delay in calling the estate for audit estops the heirs from contesting the residuary bequests. The record does not indicate, however, that this delay can be attributed to the heirs. Therefore it cannot operate to estop them.

in the will. *Cavill Estate*, 56 Erie County Legal J. 44 (Pa. O.C. 1973). Decedent's intestate heirs have appealed.[4] We affirm.

Although statutory provisions substantially identical to section 7(1) have been in effect in Pennsylvania since 1855,[5] this Court has never passed on the constitutionality of this so-called "Mortmain statute."[6] A three-pronged constitutional attack is now before us. En route to its holding, the orphans' court concluded that by invalidating all charitable or religious gifts included in a will executed within thirty days of death, section 7(1) violates the due process, privileges and immunities, and equal protection clauses of the Fourteenth Amendment. *Id.* 46-47. We need consider only one of these grounds; we conclude that section 7(1) denies the charitable beneficiaries equal protection of the laws.[7]

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[4] Appellate Court Jurisidiction Act of 1970, Act of July 31, 1970, P.L. 673, art. II, § 202(3), 17 P.S. § 211.202(3) (Supp. 1974).

[5] See Act of April 26, 1855, P.L. 328, § 11; Act of June 7, 1911, P.L. 702, § 1; Act of June 7, 1917, P.L. 403, § 6; Act of April 24, 1947, P.L. 89, § 7; 20 Pa. S. § 2507(1) (Supp. 1974).

[6] In 1880 the Court did allude in dictum to the constitutionality of the then-existing Mortmain statute.

> "While the propriety of legislation which thus limits the right of giving for religious or charitable purposes may sometimes have been questioned, it has never been doubted that the act is constitutional, and the only question presented for our consideration is whether the residuary bequest is for either a religious or charitable use, and therefore falls within the prohibition of the statute."

Rhymer's Appeal, 93 Pa. 142, 146 (1880).

[7] U.S. Const. amend. XIV, § 1. Our holding is likewise mandated by the prohibition of special laws in the Pennsylvania Constitution, Pa. Const. art. III, § 32.

Appendix "B"—Opinion in the Supreme Court of Pennsylvania—Western District

The *raison d'etre* of Mortmain statutes has been variously described.

> "The motive behind these acts is not hostility to charity, but rather a desire to prevent imposition upon the donor and to protect his family against unwise generosity. The statutes are intended to require gifts to charity to be made with proper deliberation and at a time when the donor is in at least reasonably competent physical condition. They seek to hold for the near relatives of the donor a fair share of his estate, as against the claims of charity."

3 G. Bogert, The Law of Trusts and Trustees § 326, at 683 (2d ed. 1964). See also 4 A. Scott, The Law of Trusts § 362.4, at 2821 (3d ed. 1967).

> "The basic purpose of the 30 day requirement was and is to prevent a testator during his last illness from being importuned or otherwise influenced, by hope of reward or fear of punishment in the hearafter, to leave his estate in whole or in part to charity or to church."

McGuigen Estate, 388 Pa. 475, 478, 131 A.2d 124, 126 (1957) (Bell, J.) (dictum); see *Paxon's Estate*, 221 Pa. 98, 111, 70 A. 280, 285 (1908).

The basic principles which govern this case are well known.

> "'[T]he Fourteenth Amendment does not deny to States the power to treat different classes of persons in different ways. Barbier v. Connolly, 113 U.S. 27, 5 S.Ct. 357, 28 L.Ed. 923 (1885); Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 31 S.Ct. 337, 55 L.Ed. 369 (1911); Railway Express Agency v. New York, 336 U.S. 106, 69 S.Ct. 463, 93 L.Ed. 533 (1949); McDonald v. Board of Election Commissioners, 394 U.S. 802, 89 S.Ct. 1404, 22 L.Ed.2d 739 (1969). The Equal Protection Clause of the amendment does, however, deny to States the power to legislate that different

> treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. A classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." Royster Guano Co. v. Virginia, 253 U.S. 412, 415, 40 S.Ct. 560, 64 L.Ed. 989 (1920).'"

Eisenstadt v. Baird, 405 U.S. 438, 446-47, 92 S. Ct. 1029, 1035 (1972), quoting *Reed v. Reed*, 404 U.S. 71, 75-76, 92 S. Ct. 251, 253 (1971).

Section 7(1) divides testators into two classes. One class is composed of those testators whose wills provide for charitable gifts and who die within 30 days of executing their wills. The other class is composed of those testators who either make no charitable gifts or survive the execution of their wills by at least 30 days. The statute renders invalid any charitable gifts made by a testator in the first class if any person "who would benefit by its invalidity" objects.[8] In all other cases, one who wishes to invalidate a testamentary gift must prove lack of testamentary capacity or undue influence.

Clearly, the statutory classification bears only the most tenuous relation to the legislative purpose. The statute strikes down the charitable gifts of one in the best of health at the time of the execution of his will and regardless of age if he chances to die in an accident 29 days later. On the other hand, it leaves untouched the charitable bequests of another, aged and suffering from a terminal disease, who survives the execution of his will by 31 days. Such a combination of results can only be characterized as arbitrary.

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[8] Act of April 24, 1947, P.L. 89, § 7(1). See note 1, supra.

Furthermore, while the legislative purpose is to protect the decedent's family, the statute nevertheless seeks to nullify bequests to charity even where, as here, the testator leaves no immediate family.[9] In these circumstances, the statute would operate to "protect" only distant relatives, with whom the testator may have had little or no contact during life, against the carefully selected and clearly identified objects of the testator's bounty. This protection of a nonexistent "family" defeats the testator's expressed intent without any relation to the purpose which is sought to be promoted, further demonstrating the irrationality of the statutory classification.

Because the statute sweeps within its prohibition many testamentary gifts which present no threat of the evils which the statute purports to minimize, it is substantially over-inclusive. Since the statute also leaves unaffected many gifts which do present such a threat, it is also substantially under-inclusive. We are thus compelled to conclude that it lacks "a fair and substantial relation" to the legislative object. Therefore, the Equal Protection Clause forbids us to give it any effect. *Eisenstadt v. Baird*, 405 U.S. 438, 447, 92 S. Ct. 1029, 1035 (1972); *Reed v. Reed*, 404 U.S. 71, 76, 92 S. Ct. 251, 253 (1971); *F. S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415, 40 S. Ct. 560, 561 (1920).

The decree of the orphans' court is affirmed. Each party may own costs.

MR. JUSTICE POMEROY filed a dissenting opinion in which MR. JUSTICE EAGEN joins.

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[9] Leona Cavill left no surviving issue, spouse, ancestor, or sibling. All of the next of kin were children of her deceased brothers and sister.

Appendix "B"—Opinion in the Supreme Court of Pennsylvania—Western District

[J.247]

IN THE

SUPREME COURT OF PENNSYLVANIA

WESTERN DISTRICT

IN THE MATTER OF THE ESTATE OF LEONA E. CAVILL, Deceased.

ERNESTINE MITCHELL, CHARLOTTE VICKERS, now FLICK, RICHARD STOLZ, DALE STOLZ, ZOE SCHNEIDER, FRANCIS (BUD) STOLZ, MERCEDES STRELECKI, THEODORE G. STOLZ, DONALD L. STOLZ, and MARJORIE STOLZ,

Appellants.

No. 1 March Term, 1974.

APPEAL FROM THE DECREE OF THE COURT OF COMMON PLEAS OF ERIE COUNTY, ORPHANS' DIVISION, ENTERED JUNE 4, 1973 AT NO. 28, MAY LIST 1960.

DISSENTING OPINION.

POMEROY, *J.* Filed: December 5, 1974

I

Equal Protection

The Court today strikes down as violative both of the United States Constitution and the Pennsylvania Constitu-

tion § 7(1) of the Wills Act of 1947,[1] a provision which for well over a century has been part of the fabric of our law governing wills and decedents' estates.[2]

In so doing, while purporting to apply well-established constitutional principles governing equal protection of the laws, the majority comes perilously close to assuming the posture of a super-legislature which judges the wisdom rather than the validity of legislation. *See San Antonio School District v. Rodriguez*, 411 U.S. 1, 40, 36 L.Ed.2d 16, 47 (1973); *Shapiro v. Thompson*, 394 U.S. 618, 661, 22 L.Ed.2d 600, 631 (1969) (dissenting opinion of Mr. Justice Harlan); *Goesert v. Cleary*, 335 U.S. 464, 466, 93 L.Ed. 163, 166 (1948). I am compelled to dissent.

The Supreme Court of the United States has consistently held that when considering an equal protection challenge to a state legislative classification scheme which does not involve either a "suspect" classification or a "fundamental" right, the proper test to apply is whether the classification bears some rational relationship to a permissible state objective. *Dandridge v. Williams*, 397 U.S. 471, 25 L.Ed.2d 491 (1970); *McDonald v. Board of Election*, 394 U.S. 802,

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[1] Act of April 24, 1947, P.L. 89, § 7(1), 20 P.S. § 180.7(1). The majority notes that its analysis extends to § 7(1)'s successor provision, § 2507(1) of the Probate, Estates, and Fiduciaries Code. 20 Pa. S. § 2507(1), effective July 1, 1972. Because the language of the two provisions is not identical, however, there would appear no necessity for adjudicating the constitutionality of the latter provision until the issue is squarely before this Court.

[2] Substantially similar provisions are included in the laws governing the testamentary disposition of property of various other states of The Union. Restatement (Second) Law of Trusts, § 362(c) and Appendix thereto, 1959; Am. Jur. 2nd, Charities, § 23.

22 L.Ed.2d 739 (1969); *Levy v. Louisiana*, 391 U.S. 68, 20 L.Ed.2d 436 (1968). *See also Eisenstadt v. Baird*, 405 U.S. 438, 447, 31 L.Ed.2d 349, 358-59 (1972).[3] The rational basis test is particularly appropriate when the economic or social legislation in issue pertains to matters the regulation of which rests peculiarly within the province of state or local government. *San Antonio School Dist. v. Rodriguez, supra* at 40, 36 L.Ed.2d at 47; *Labine v. Vincent*, 401 U.S. 532, 538, 28 L.Ed.2d 288, 294 (1971), reh. den. 402 U.S. 990, 29 L.Ed.2d 156 (1971).

That the state has a significant interest in, as well as the paramount authority to regulate, the devolution of an individual's property at death cannot be questioned. *Harris v. Zions Bank Co.*, 317 U.S. 447, 87 L.Ed. 390 (1943); *Scott Estate*, 418 Pa. 332, 211 A.2d 429 (1965); *Maginn's Estate*, 278 Pa. 89, 122 A. 264 (1923). The state's power in this area, which is virtually plenary, permits it constitutionally to determine who may give and who may receive property at death, whether by will or intestacy, under what circumstances, and by what methods. *Labine v. Vincent, supra* at 537, 28 L.Ed.2d at 293; *Lyeth v. Hoey*, 305 U.S. 188, 193, 83 L.Ed. 119, 123 (1938); *United States v. Burnison*, 339 U.S. 87, 94 L.Ed. 675 (1949); *Tack's Estate*, 325 Pa. 545, 191 A. 155 (1937).[4] As Justice (later Chief Justice) Stern stated

[3] When a statutory scheme affects a suspect classification or a fundamental right, the state carries the burden of demonstrating that it is necessary to promote a compelling state interest. *Shapiro v. Thompson, supra* at 634, 22 L.Ed.2d at 615.

[4] In *United States v. Burnison, supra*, the Supreme Court of the United States held that a California statute which prevented the state's domiciliaries from making testamentary bequests to the United

(Footnote continued on following page)

in the case last cited, "[t]he right to transmit or to receive property by will or through intestacy is not a natural right but a creature of statutory grant." 325 Pa. at 548, 191 A. at . *See also In re Noyes Estate*, 40 Mont. 178, 105 P. 1013 (1909); In re Walker's Estate, 110 Cal. 387, 42 P. 815 (1895).[5] Thus, as the majority implicitly recognizes, it is *at most* the rational basis test by which the constitutional validity of § 7(1) is to be judged.

Whether § 7(1) creates a classification scheme at all is for me a dubious question. The Wills Act of 1947 together with its companion statute, the Intestate Act of 1947, Act of April 24, 1947, P.L. 80, § 1 *et seq.*, 20 P.S. § 1.1 *et seq.*, constitutes a comprehensive plan designed to insure the orderly transmission of property of persons who die resident in this Commonwealth. The Wills Act prescribes numerous conditions which must be met in order for a

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States while permitting such gifts to be made to the state did not constitute the kind of invidious discrimination which the Fourteenth Amendment proscribes. The Court noted that a long line of cases has "consistently held that part of the residue of sovereignty retained by the states, residue insured by the Tenth Amendment, is the power to determine the manner of testamentary transfer of a domiciliary's property and the power to determine who may be made beneficiaries." 339 U.S. at 91-92, 94 L.Ed at 681.

[5] When presented with an attack identical to the one made in the instant case, the Supreme Court of Florida stressed that because there is neither an explicit nor implicit reference to the subject of decedent's estates in either the federal or state constitutions, "[t]he right of testamentary disposition of property . . . is a creature of the law derived solely from statute without constitutional limitation. Accordingly, the right is at all times subject to regulation and control by the legislative authority which creates it . . ." *Taylor v. Payne*, 154 Fla. 359, 362-63, 17 So.2d 615, 617 (1944), app. dism. 323 U.S. 666, 89 L.Ed. 541, reh. den. 323 U.S. 813, 89 L.Ed 647 (1944).

testamentary disposition to be a valid will, and places various restrictions upon an individual's power to dispose of his property in accordance with his wishes. Thus, § 2 requires that for a will to be valid it generally must be in writing, must be signed by the testator, and must be signed by the testator "at the end thereof"; and § 3 automatically voids any nuncupative will which will attempts to dispose of an estate of personalty greater than $500. Moreover, § 7, generally, provides that upon the occurrence subsequent to the execution of a will of certain specified events, *i.e.* divorce, marriage, birth, adoption, slaying, and death within thirty (30) days of the execution of a bequest to a charitable institution, a modification of the testator's will shall result. Because this section is deemed by the legislature to reflect the intentions of most persons who have experienced such change in circumstances, the modification occurs by operation of law and in most instances without regard to the actual intentions of the individual testator. See comment to clause 2 of § 7 at 20 P.S. § 180.7. Without belaboring the point it is simply that any of the preconditions of valid execution of a will or the several provisions for modification of a will by circumstances can be manipulated into "classifications." The same can be said of the carefully structured Intestate Law of Pennsylvania, 20 P.S. § 1.1 *et seq., supra*, which controls the transfer at death of the very substantial property interests of those persons who die without leaving a will. Whether, realistically viewed, the creation of classifications is the effect of such statutory provisions is another matter entirely. It is puzzling that the Court in its opinion has failed even to mention the recent decision of the Supreme Court of the United

States in *Labine v. Vincent*, 401 U.S. 532, 28 L.Ed.2d 288 (1971), which in my view is virtually controlling in this case. There, that portion of the Louisiana intestate law which prohibits illegitimate children from inheriting equally with legitimate children from their natural father was challenged as constituting a denial to illegitimates of equal protection of the laws. The Court, speaking through Mr. Justice Black, emphasized the extensive power which a state possesses to establish rules of inheritance and the legitimate interest of the state in so doing. In finding the petitioner's claim without merit, the Court expressed its scepticism as to whether such statutory schemes do in fact create classifications. "Even if we were to apply the 'rational basis' test to the Louisiana intestate succession statute, that statute clearly has a rational basis, in view of Louisiana's interest in promoting family life and of directing the disposition of property left within the state." 401 U.S. at 536, 28 L.Ed.2d at 292.[6]

Assuming, however, that § 7(1) does create a classification scheme, there remains the task of testing its validity against the appropriate standard. The majority has adverted to the two basic legislative purposes underlying the provision: to prevent the possibility that a testator, faced

[6] Justice Black went on to state for the majority: "[t]hese rules for intestate succession may or may not reflect the intent of particular parents. Many will think that it is unfortunate that the rules are so rigid. Others will think differently. But the choices reflected by the intestate succession statute are choices which it is within the power of the state to make. The Federal Constitution does not give this Court the power to overturn the State's choice under the guise of constitutional interpretation because the Justices of this Court believe that they can provide better rules." 401 U.S. at 537, 28 L.Ed.2d at 293.

with impending death and in fear of eternal damnation, may impulsively bequeath an inordinate proportion of his property to charitable institutions, *McGuigen Estate*, 388 Pa. 475, 131 A.2d 124 (1957); and to insure that the next-of-kin and natural heirs of a testator are protected from a less than deliberate transfer of the estate. *Baum Estate*, 418 Pa. 404, 407 n.2, 211 A.2d 521, 522 n.2 (1965). My brother Roberts in speaking for the majority does not deny that these are entirely permissible concerns of the state but concludes, rather, that the statutory classification does not bear a rational relationship to those purposes. This is so, he reasons, because the statute is both overinclusive and underinclusive. I find this rationale wholly untenable; under the guise of the traditional rational basis test, the Court has, in fact, applied the "strict scrutiny" standard demanded only in those instances where a suspect classification or a fundamental right is at stake.[7] In those cases where the rational basis test is appropriate, the concepts of overbreadth and underbreadth are irrelevant and there exists no requirement that the state demonstrate a statute drawn with mathematical precision. *Dandridge v. William*, *supra* at 484, 25 L.Ed.2d at 501; *cf. Harper v. Virginia Board of Elections*, 383 U.S. 663, 670, 16 L.Ed.2d 169, 174 (1966). While it might be desirable that all regulatory legislation be so perfectly drawn as to foreclose the possi-

[7] In *Rodriguez, supra*, the Supreme Court of the United States noted that, as delineated in prior decisions of that Court, the strict scrutiny test converts the usual presumption of constitutionality which state legislation generally enjoys to one of invalidity; places the "heavy burden of justification" upon the state rather than the challenger; and requires the state to demonstrate a "narrowly tailored" plan for coping with its legislative objectives, 411 U.S. at 16, 36 L.Ed.2d at 33.

bility of reaching an activity or situation not intended to come within its scope, this is, of course, an impossibility. It is sufficient, therefore, that the classification scheme is *reasonably* related to the legislative objective. *Morey v. Doud*, 354 U.S. 457, 465, 1 L.Ed.2d 1485, 1491 (1957).[8] "It is no requirement that all evils of the same genus be eradicated or none at all." *Railway Express Agency v. New York*, 336 U.S. 106, 110, 93 L.Ed.2d 533, 539 (1949). It is true, of course, that the thirty day rule of § 7(1) could operate upon occasion to permit to stand bequests which were irrationally made[9] and to void others which were the product of calm reflection. This fact alone, however, does not render the rule unconstitutional. As was most recently stated by this Court through Mr. Justice Manderino, "[t]he use of mathematical limitations as the basis for separate classifications in the law is constitutional so long as the number selected bears a reasonable relationship to a legitimate legislative objective." *Goodman v. Kennedy*, Pa. . . A.2d . (1974) (filed October 25, 1974). Certainly the legislature's determination that the thirty day rule would operate generally to protect those testators who execute their wills in their last illnesses cannot be considered irrational. To require any further degree of pre-

[8] ". . . [S]uch discrepancies are the inevitable concomitant of the linedrawing that is essential to lawmaking. So long as the classification is rationally related to a permissible legislative end, therefore, . . . there is no denial of equal protection." *Kramer v. Union Free School District*, 395 U.S. 621, 633, 23 L.Ed.2d 583, 595-96 (dissenting opinion of Mr. Justice Stewart).

[9] The will of a testator who survives the thirty day period of course continues subject to challenge on the grounds of undue influence or lack of testamentary capacity.

cision would result in legislative paralysis. As was noted in *Goodman, supra,* this Court has upheld numerical classification where to do otherwise would hinder enforcement and application of the statute. See Pa. at , A.2d at and cases there cited.

In sum, I must conclude that § 7(1) is entirely consistent with the demands of equal protection in both the federal and Pennsylvania Constitutions. In an age when the hope of salvation may be less vivid and the fear of damnation less acute than formerly it was, one may disagree with the wisdom or necessity of the provision before us today; but wisdom—whether that of this Court or the legislature—is not determinative of legislative power. In my opinion, § 7(1) is a proper exercise of that power.

II

Due Process

In light of its disposition, the majority has not deemed it necessary to consider the alternative ground of decision below, *viz.*, that § 7(1) of the Wills Act denies the appellees due process of the law as well as equal protection of the laws. Because I differ with the Court's conclusion as to equal protection, it is necessary to face the due process argument. Here again, I do not agree that any constitutional rights of the charities are involved. The trial court held that § 7(1) denies the appellee-charities due process of law in that it creates an irrebuttable presumption of either undue influence or the testator's incompetence as to the charitable bequest. This conclusion, as I see it, is both unfounded and unnecessary. In the exercise of its power to

regulate the devolution of decedents' estates, the legislature through § 7(1) has created not a presumption but an *express proscription* against testamentary gifts to charities and religion within the thirty day period.[10] This distinction between a conclusive presumption and a flat prohibition is not one without a difference when the constitutional implications of a state's legislative action are at stake.[11]

If it be assumed, for the sake of argument, that § 7(1) creates a presumption, it can hardly be deemed an irrebuttable one. The section provides two methods by which the charitable beneficiary may "rebut" the "presumption." The first is by obtaining the consent of all other interested parties; the second is by proving the existence of a prior will executed before the thirty day period which had been revoked by the second will, and which contains identical gifts for substantially the same charitiable purposes. As the Court stated in *Baum Estate, supra*, the purpose of these two provisions was

> ". . . to remove from the operation of our thirty-day prohibition those cases which did not, in reason, fall within the purpose of the thirty day rule. *See McGuigen Estate*, 388 Pa. 465, 131 A.2d 124 (1957); Com-

[10] It is, of course, a fundamental rule of statutory construction that the legislature is presumed to have intended its action to conform to the prescriptions of the Constitutions of the United States and of this Commonwealth. Statutory Construction Act of 1972, 1 Pa. S. § 1922(3). Thus, when there are two reasonable interpretations of a statute, one which would invalidate it and the other which would validate it, the latter must be chosen.

[11] The power of a legislature to proscribe certain conduct does not imply the power to permit irrebuttable presumptions to flow from that conduct. *Leary v. U.S.*, 395 U.S. 6, 23 L.Ed.2d 57 (1969); *Tot v. U.S.*, 319 U.S. 463, 87 L.Ed. 1519 (1943).

ments of the Joint State Government Commission, Comment to Section 7(1), 20 P.S. Section 180.7, pp. 267, 268." *Baum Estate, supra* at 411, 211 A.2d at 524.

If, then, the so-called presumption is not in fact iron-clad under all circumstances, there has been no absolute denial of the charitable beneficiaries' rights to be heard. If, on the other hand, and as I believe to be the case, § 7(1) expresses a proscription, then there has been no denial of these rights because the appellees had none.

Before the guarantees of procedural due process attach, a complaining party must demonstrate that he possesses some recognized interest of life, liberty, or property. *Board of Regents v. Roth*, 408 U.S. 564, 569-70, 33 L.Ed.2d 548, 556-57 (1972).

> "The fourteenth amendment's procedural protection of property is a safeguard of the security of interests that a person has already acquired in specific benefits. [citations omitted] To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." *Bd. of Regents v. Roth, supra* at 576-77, 560-61. *See Perry v. Sindermann*, 408 U.S. 593, 33 L.Ed.2d 570 (1972).

In the instant case it is impossible to see what property interest, what right of entitlement these charities possess. The right to receive property by will is not a natural right but one conferred, if at all, by statute. *Tack's Estate, supra.* The legislature has determined that charitable and religious institutions shall generally have no right to inherit property unless the testator survives by thirty days the making of his will in which is contained a charitable or

religious bequest. Failure to grant a right which is broader is not a denial of due process of law. Recent cases decided by the Supreme Court of the United States on the "irrebuttable presumption" theory are immediately distinguishable on this ground. In each, the petitioner possessed a clear right of liberty or property which had been summarily extinguished by the state. *See Stanley v. Illinois*, 405 U.S. 645, 651, 31 L.Ed.2d 551, 558 (1972) (the essential right to conceive and raise one's children); *Cleveland Board of Education v. La Fluer*, U.S. , 39 L.Ed.2d 52, 60 (1974) (the fundamental right of personal choice in matters of marriage and family life); *Bell v. Burson*, 402 U.S. 535, 539, 29 L.Ed.2d 90, 94 (1971) (important interest in maintaining possession of driver's license issued by state); *Vlandis v. Kline*, 412 U.S. 441, 452, 37 L.Ed.2d 63, 72 (1973) (property interest in one's own money).[12] Whatever the meaning of "irrebuttable presumption," it is not, without more, a constitutionally signi-

[12] It is significant to note that Mr. Chief Justice Berger dissented from the decision in *Vlandis* on the ground that the majority had failed adequately to demonstrate that the petitioner possessed any genuine interest of liberty or property which merited constitutional protection. The Chief Justice went on to state:

> "There will be, I fear, some ground for a belief that the Court now engrafts the 'close judicial scrutiny' test onto the Due Process Clause whenever we deal with something like 'permanent irrebuttable presumptions.' But literally thousands of state statutes create classifications permanent in duration, which are less than perfect. . . . for example, a State provides that a person may not be licensed to practice medicine or law unless he or she is a graduate of an accredited professional graduate school; a perfectly capable practitioner may as a consequence be barred 'permanently and irrebuttably' from pursuing his calling without ever having an opportunity to prove his personal skills." *Vlandis v. Kline, supra*, dissenting opinion of Berger, C.J. at 462, 37 L.Ed.2d at 77.

ficant phrase. Our attention must focus first on the existence or non-existence of a constitutionally protected interest. Because the appellees possess no such interest, their due process claim must fail.

I would reverse the decree of the lower court and direct distribution in accordance with the provisions of the Wills Act.

Mr. Justice Eagen joins in this dissent.

APPENDIX "C"

Supplemental Opinion and Decree in the Court of Common Pleas of Blair County, Pennsylvania

IN THE
COURT OF COMMON PLEAS
OF BLAIR COUNTY, PENNSYLVANIA.
ORPHAN'S COURT DIVISION

IN RE: ESTATE OF GILBERT F. RILEY, Deceased, Late of the Borough of Hollidaysburg, County of Blair and Commonwealth of Pennsylvania.

No. 220 O. C., 1972.
(Subsequently improvidently entered
to No. 432 O. C., 1972.)

ROBERT C. HABERSTROH, *Judge.*

John F. Sullivan, Esq., and Neil B. Murchison, Esq., Attorneys for The Estate of Gilbert F. Riley, Deceased.

Patrick E. O'Leary, Esq., and Thomas G. Peoples, Jr., Esq. and Ball and Skelly by William B. Ball, Esq., and Joseph G. Skelly, Esq., Attorneys for The Most Reverend James J. Hogan, D.D. Bishop of The Altoona-Johnstown Diocese; Estate of Monsignor John F. Cullinan, Deceased, and St. Michael's Roman Catholic Church, Assignee of The Heirs of Monsignor John F. Cullinan, Deceased.

Harrison C. Snyder, Esq., and Ruffin, Hazlett, Perry & Lonergan By Gary H. McQuone, Esq., Attorneys for Russell J. Riley, Earl V. Riley, Francis Riley, Mrs. Margaretta Burke, Marceline Riley, Leroy Riley, Helen Housum, Robert Riley, Fred Socie, Melvin Socie, Mrs. Geraldine Packer, Intestate Heirs of Gilbert F. Riley, Deceased.

Appendix "C"—Supplemental Opinion and Decree in the Court of Common Pleas of Blair County, Pennsylvania

SUPPLEMENTAL OPINION AND DECREE OF THE COURT

SUPPLEMENTAL HISTORY OF THE CASE

The matter immediately before the Court for consideration and disposition are exceptions heretofore filed to the Report and Recommendation of Thomas M. Reese, Esquire, Auditor named by this Court to dispose of Exceptions and to make distribution of the residuary Estate of Gilbert F. Riley, deceased. The instant disposition following application for and allowance of reconsideration and reargument of the exceptions theretofore filed. The instant re-argument raises a question as to the constitutionality of the Act of Assembly, to wit, Sec. 180.7 of the Wills Act of 1947 as supplemented and amended (20 P.S. 180.7, Sub-sec. 1) as it applies to the residuary clause contained in the Last Will and Testament of the deceased.

Under date of August 25, 1972, this Court filed its Opinion and Decree directing distribution of the residuary estate to the intestate heirs of Gilbert F. Riley, the testator. At that time no one either before the Auditor or the Court had raised the question as to the constitutionality of Sec. 180.7 of the Wills Act then applicable.

Thereafter, under date of September 21, 1972, upon motion of Thomas G. Peoples, Esquire, and Patrick E. O'Leary, Esquire, representing the exceptants (the legatees named in the Last Will and Testament of the deceased or their assigns) this Court directed that a reconsideration of the exceptions to the Auditor's Report be had and that

further legal argument would be heard by the Court on October 27, 1972. Said Order of Court further directed all proceedings in connection with the estate of the deceased be stayed pending the rehearing and disposition of the new legal arguments to be presented. The basis of this Petition for Rehearing was that the District Court of the District of Columbia had as reported in the September, 1972 edition of "Fiduciary Review". In the case of *In Re: Small*, 40 L. W. 2547 (1972) held a statute closely resembling that of Sec. 180.7 of the Wills Act of 1947, as amended, (said section voiding charitable and religious gifts in Wills executed within thirty (30) days of death) as being unconstitutional in that it discriminated against religious and charitable gifts and violated the First Amendment to the United States Constitution.

The record further discloses that under date of September 22, 1972, an appeal was filed in the Supreme Court of Pennsylvania, Eastern District, to No. 81 January Term, 1973, said appeal being by the Estate of Monsignor John F. Cullinan, deceased, and St. Michael's Roman Catholic Church as Assignee from the definitive Decree made by this Court on the 25th day of August, 1972, entered to the above captioned number.

Subsequently, upon application of counsel for the intestate heirs of the decedent the date of hearing on the Application for Re-Argument was extended to the 27th day of November, 1972.

Under date of November 10, 1972, the intestate heirs of the testator filed their Answer to the Petition for Re-

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Argument, and in said Answer and in the oral argument had in connection therewith raised the question that this Court did no longer have jurisdiction in the matter and could not grant a rehearing in connection therewith.

After the matters had been argued and written briefs submitted this Court under date of December 14, 1972, entered its Order directing that James J. Hogan, Bishop of the Altoona-Johnstown Catholic Diocese, be and he was granted leave and permission to intervene as a party-petitioner for reconsideration, rehearing, re-argument or review in said matter; and secondly, this Court held that the reconsideration or review requested by the petitioners in the instant matter be allowed and the matter was fixed for hearing for January 12, 1973.

Under date of November 27, 1972, Ball and Skelly, Attorneys-at-law, appeared on behalf of the Most Reverend James J. Hogan, D.D. Bishop of the Altoona-Johnstown Diocese, Trustee for St. Michael's Roman Catholic Church at Hollidaysburg, Pennsylvania.

Under date of December 20, 1972, Thomas G. Peoples, Esquire, Attorney for the Appellants withdrew and discontinued appeal filed in the Supreme Court of Pennsylvania in and for the Eastern District of Pennsylvania to No. 81 January Term, 1973, to which reference has heretofore been made.

Upon application by counsel for the residuary legatees named in the Last Will and Testament of the deceased or their assignees or representatives, oral argument was continued to February 13, 1973, at which time Ruffin, Hazlett,

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Perry & Lonergan, by Gary H. McQuone, Esq., appeared with Mr. Snyder as attorney for the intestate heirs of the decedent. Oral argument was had, briefs were submitted on behalf of the religious beneficiary designated in the Will, and thereafter, written brief was submitted on behalf of the intestate heirs and supplemental briefs were filed by all of the parties involved and the matter now rests with this Court for determination and disposition.

Counsel for the religious legatee named in the Last Will and Testament of the decedent or the assignee of the legatees named, argues the unconstitutionality of Sec. 180.7 of the Wills Act of 1947, as amended, on the basis that it is an improper legislative regulation discriminating against religious organizations and is violative of the First Amendment to the Federal Constitution. The intestate heirs argue that this Court has no jurisdiction to reconsider the matter; and further, that the Act of Assembly in question is constitutional and proper.

DISCUSSION

In response to the intestate heir's argument that this Court cannot rehear or reconsider its decision in the matter we would refer to the Opinion of this Court filed under date of December 14, 1972, and would incorporate the provisions of that Opinion and Decree, by reference thereto, herein.

To that Opinion we would add the observation that under the provisions of the Act of August 10, 1951, P.L. 1163, Art. 7, Sec. 773 (20 P.S. 2080.773) it was provided as follows:

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> "The Supreme and Superior Courts of the Commonwealth shall, in all cases of appeal from a decree of the orphans' court, hear, try and determine the same as to right and justice may belong, and decree according to the equity thereof, and may place or allocate the record costs, including printing costs, upon an appellant or appellee or upon the estate or trust."

Substantially the same provision is found in Sec. 794 of the Probate Estates and Fiduciaries Code of December 6, 1972, No. 331 (20 PS of Probate Estates and Fiduciaries—Orphans' Court Division 794).

Certainly no less would be required of this Court. At the time the rehearing was granted there was no appeal pending, when the re-argument was had, there was no appeal pending and, certainly it devolves upon this Court to see that right and justice prevails in this matter and for this additional reason we believe the hearing of the re-argument and the disposition thereof was and is right and proper.

Passing along now to the question as to the constitutionality of Sec. 180.7 of the Wills Act as here raised it is to be noted that the First Amendment to the United States Constitution (U.S.C.A. Constitution—Amendment 1—page 19) provides specifically:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; . . ."

This amendment likewise applies to the state by virtue of the 14th Amendment to the United States Constitution: *Cruz v. Beto*, 92 S. Ct. 1079, 405 U.S. 319, 31 L. Ed. (2d) 263 (Texas—1972).

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There are two concepts here involved, the first being the freedom which a person has to believe; and the second is the freedom to act upon that belief or in accordance with that belief. The right or freedom to believe is absolute; the second concept, that is, the freedom to act is not absolute. It has been said that the second concept of this religious freedom is subject to the right of the State to enact such laws or provisions as may be necessary or proper to promote the health, the safety and the general welfare of its people or society: *Wisconsin v. Yoder*, 92 S. Ct. 1526, 406 U.S. 205, 32 L. Ed. (2d) 15 (Wisconsin—1972); *Biklen v. Board of Education, City School District, Syracuse, New York*, 333 F. Supp. 902, affirmed 92 S. Ct. 2060, 406 U.S. 951, 32 L. Ed. (2d) 340 (D.C.—N.Y.—1971). There are a multitude of cases so holding and it would serve no useful purpose to further encumber this opinion by recitation thereof.

What brought this re-argument about was the decision of the District Court in and for the District of Columbia in the case of *In Re: Small*, Administration No. 2507-70, Vol. 100 No. 47, Washington Law Reporter 453 (1972). While this case was actually decided under date of February 7, 1972, knowledge of this decision was not had by this Court or by any counsel here involved until subsequent to the filing of the Order and Decree of this Court under date of August 25, 1972. In the cited authority the Court had before it the question of the construction of the Will of the deceased in which she left various parts of her estate to a series of Catholic religious institutions and to various charitable institutions, the section of the District of Colum-

bia Code which found application was titled 18 Sec. 302 of the District of Columbia Code which provided, *inter alia*, as follows:

> "A devise or bequest of real or personal property to a minister, priest, rabbi, public teacher, or preacher of the gospel, as such, or to a religious sect, order, or denomination, or to or for the support, use, or benefit thereof, or in trust therefor, is not valid unless it is made at lease 30 days before the death of the testator."

The Will there in question fell within that thirty (30) day period and the question presented was whether the devisors to admittedly religious sects or orders should be upheld or set aside. The Court after pointing out that the Statute was in the nature of a Mortmain Statute made the following observation:

> "The Court is unable to find in the statute any justification which can withstand examination of the statute in the light of the First Amendment. Clearly the statute discriminates against religion. Many others would be in an equal position to influence a testator—lawyers, nurses, physicians, charitable organizations, and the like. The statute does not run to any such persons and, therefore, it cannot be said to be a statute which is designed to prohibit all bequests suggesting improper influence because made in the 30 days prior to execution of the will.
>
> "The difficulty with the statute, as the Court sees it, is that it singles out religion for particular treatment, without any justification. As counsel points out, if anything, religious institutions, where the Government interferes, are in a preferred position, but at least they should be in these circumstances in an equal position. I see no basis of compelling Government necessity or otherwise for the Government to interfere with reli-

gious practice, as the statute appears to do in its operation. The statute creates no mere presumption but creates an irrebuttable attack on the will which cannot, as the Court reads the statute, be ameliorated or modified by the facts and circumstances of any particular case; and as this case well illustrates, there are many facts and circumstances that would operate against the statute if it were phrased in this instance merely as a presumption rather than an irrebuttable requirement.

"Accordingly, the Court will direct that the will be construed without regard to Title 18, Sec. 302, and that the bequests there made, if otherwise valid, should be carried out.

"I am, of course, speaking only prospectively. I think it worth noting, however, that the courts of this jurisdiction have in a number of other cases sought by various types of judicial interpretation and perhaps almost leger-de-main in a few cases to avoid the operation of the statute in spite of its express terms by attempting to identify the legatee as a charitable rather than purely religious donee.

"The First Amendment is now clearly defined in many cases, including cases brought to the Court's attention in the papers. The question of determining what acts of Government tend to interfere with religion falls well within what the courts have long been called on to do in this sensitive area and I think it is time this statute be identified for what it is and stricken."

We subscribe completely with the observation of the District Court here involved and we believe that it has particular application in the instant matter.

As a matter of fact, in connection with Sec. 180.7 there is even more reason to declare the section to be unconstitutional by virtue of the fact that it seeks to strike down both

religious as well as charitable bequests, and this Court is of the opinion that there is certainly nothing apparent or argued or brought forth to this Court that shows that such a discriminatory treatment is needed or necessary in connection with the right of the State to promote the health, safety and general welfare of its peoples. As a matter of fact, such discriminatory treatment is in the judgment of this Court not only a serious proscription of the right of one to practice his religion and to act in support thereof, but it is also to the disadvantage of society generally from the standpoint of health, safety and general welfare by virtue of the fact that as a matter of fact most charitable gifts found in a will is for bequests to charitable organizations promoting the health, safety and general well being of the people.

In the argument had upon rehearing in this matter it was quite appropriately pointed out that one may leave his entire estate to a paramour, a prostitute, a dog or a cat and that is entirely valid, legal and enforceable. Yet a gift to charity or a religious organization, within the thirty (30) day period, is wholly invalid and void. We believe that this example clearly shows the discriminatory nature of the Legislation in question and fortifies one in its position that it is an unjust and an improper discrimination against the practice of one's religion, and in addition thereto, is wholly an improper restriction by the State and, therefore, dictates the conclusion that one finds that it is wholly unconstitutional and invalid.

It is further to be noted that subsequent enactments by the Legislature of this Commonwealth in connection with

such matters has been weakened considerably and it is quite apparent that in due time legislatively the restrictions would be entirely removed from the enactment. We believe that the same should be done forthwith because they are an unconstitutional provision contrary to the First Amendment of the Constitution of the United States of America, and for that reason we strike the provision as being unconstitutional.

Accordingly, we find as a matter of fact and conclude as a matter of law that the provision found in Item IV of the Last Will and Testament of the decedent providing as follows, to wit:

> "ALL the rest, residue and remainder of my estate, of whatsoever nature and character and wheresoever situate, including that over which I may have the power of disposition, and including all cash, securities, stocks and bonds, I do hereby give, devise and bequeath unto the Pastor of St. Michael's Roman Catholic Church of Hollidaysburg, Pennsylvania, to be used in whatever way it deems fit and proper and for the benefit of both St. Michael's Church and School."

is valid and enforceable.

Appendix "C"—Supplemental Opinion and Decree in the Court of Common Pleas of Blair County, Pennsylvania

We, therefore, enter the following Order:

ORDER OF THE COURT

NOW, to wit, this 11th day of June, A.D. 1973, the Order of this Court under date of August 25, 1972 is vacated and set aside, and in lieu thereof the exceptions heretofore filed to the report and recommendation of Thomas M. Reese, Esquire, Auditor, in the Estate of Gilbert F. Riley, deceased, be and the same are hereby sustained; the Order of Distribution as entered by the Auditor is vacated and annulled, and in lieu thereof the Executor of the Estate of Gilbert F. Riley, deceased, be and he is directed, authorized and empowered to make distribution of the net residuary estate after the payment of all proper charges unto the Most Reverend James J. Hogan, Bishop of the Altoona-Johnstown Diocese as Trustee for St. Michael's Roman Catholic Church of Hollidaysburg, Pennsylvania, assignee of the heirs of Monsignor John F. Cullinan, deceased, the legatee named in the Last Will and Testament of the said Gilbert F. Riley, deceased.

Costs to be paid by the estate of the said Gilbert F. Riley, deceased.

BY THE COURT,

ROBERT C. HABERSTROH, *J.*

Hollidaysburg, Pennsylvania.

APPENDIX "D"

Petition for Reconsideration and Order Staying Proceedings in the Court of Common Pleas of Blair County, Pennsylvania

IN THE

COURT OF COMMON PLEAS

OF BLAIR COUNTY, PENNSYLVANIA

ORPHANS' COURT DIVISION

No. 432 O. C. 1972

IN RE: ESTATE OF GILBERT F. RILEY, Deceased, Late of the Borough of Hollidaysburg, County of Blair and Commonwealth of Pennsylvania.

PETITION FOR RECONSIDERATION AND FOR LEAVE TO PRESENT NEW LEGAL ARGUMENTS AND FOR AN ORDER STAYING ALL PROCEEDINGS REGARDING SAID ESTATE

To the Honorable Judges of said Court:

The Petition of THOMAS G. PEOPLES, JR., ESQUIRE, as Attorney for the Estate of Monsignor John F. Cullinan, deceased and as Attorney for St. Michael's Roman Catholic Church as assignee of the legatees under the Last Will and Testament of Monsignor John F. Cullinan, and PATRICK E. O'LEARY, ESQUIRE, as Attorney for Most Reverend James J. Hogan, Bishop of the Altoona-Johnstown Catholic Diocese, respectfully represents:

Appendix "D"—Petition for Reconsideration and Order Staying Proceedings in the Court of Common Pleas of Blair County, Pennsylvania

1.

Gilbert F. Riley died testate on November 30, 1969.

2.

James G. Burke, the duly constituted Executor of the Estate of Gilbert F. Riley, filed his First and Final Account on April 1, 1971, showing the residue distributable to St. Michael's Roman Catholic Church as the assignee of the legatees under the Last Will and Testament of Monsignor John F. Cullinan who was then deceased.

3.

Exceptions to said First and Final Account were filed by the heirs at law of Gilbert F. Riley and the matter was referred to audit before Thomas M. Reese, Esquire, who on April 17, 1972, filed his Report with your Honorable Court recommending distribution of the residue of the Estate of the decedent's nieces and nephews as his next of kin on the theory that the residuary bequest in the decedent's Will constituted a religious or charitable gift in violation of Section 180.7 of the Wills Act of 1947, as amended, for the reason that the testator died less than thirty (30) days following execution of the subject Last Will and Testament.

4.

Exceptions to said Auditor's Report filed by the Estate of Gilbert F. Riley, St. Michael's Roman Catholic Church as assignee of the legatees named in the Last Will and

Appendix "D"—Petition for Reconsideration and Order Staying Proceedings in the Court of Common Pleas of Blair County, Pennsylvania

Testament of Monsignor John F. Cullinan and by the Estate of Monsignor John F. Cullinan, deceased, were dismissed by your Honorable Court on August 25, 1972.

5.

Subsequent to August 25, 1972, a decision of the District Court of the District of Columbia in the matter of *In Re Small*, 40 L. W. 2547 (1972), reported in the September, 1972, edition of "Fiduciary Review", has come to the attention of your petitioners.

6.

Said decision in *In Re Small, supra* held that a statute closely similar in construction to that of Section 180.7 of the Wills Act of 1947, as amended, voiding charitable gifts in wills executed within thirty (30) days of death discriminates against religion and violates the First Amendment to the United States Constitution.

7.

Your petitioners believe that in view of the decision in *In Re Small, supra*, a legal argument not earlier available in support of their exceptions to the Auditor's Report based upon constitutional grounds can now properly be raised and should be heard by your Honorable Court before any distribution is made of the assets of the Estate of Gilbert F. Riley, deceased.

Appendix "D"—Petition for Reconsideration and Order Staying Proceedings in the Court of Common Pleas of Blair County, Pennsylvania

WHEREFORE, your Petitioners respectfully pray your Honorable Court for an Order for reconsideration of the exceptions to the Auditor's Report filed by the Estate of Gilbert F. Riley, St. Michael's Roman Catholic Church as assignee of the legatees named in the Last Will and Testament of Monsignor John F. Cullinan and the Estate of Monsignor John F. Cullinan, deceased, and setting a date for hearing of your Petitioners' new legal arguments in support of said exceptions and directing that all proceedings regarding the Estate of Gilbert F. Riley, deceased, including distribution of assets of said Estate be stayed pending hearing and disposition of said new legal arguments.

And they will ever pray, etc.

PATRICK E. O'LEARY, ESQUIRE,
Attorney for Most Reverend Bishop James J. Hogan, Bishop of Altoona-Johnstown Diocese.

THOMAS G. PEOPLES, JR., ESQUIRE,
Attorney for Estate of Monsignor John F. Cullinan, deceased, and St. Michael's Roman Catholic Church.

Appendix "D"—Petition for Reconsideration and Order Staying Proceedings in the Court of Common Pleas of Blair County, Pennsylvania

Commonwealth of Pennsylvania, }
County of Blair. } ss.:

Personally appeared before me, the undersigned authority, THOMAS G. PEOPLES, JR., ESQUIRE, and PATRICK E. O'LEARY, ESQUIRE, who after being duly sworn according to law, depose and say that they are the Petitioners in the foregoing Petition and that the facts and statements set forth therein are true and correct to the best of their knowledge, information and belief.

THOMAS G. PEOPLES, JR.,
PATRICK E. O'LEARY.

Sworn to and subscribed before
me this 21st day of Sept., A. D. 1972.
W. B. Ball,
Notary Public.
My Commission Expires: Jan. 7, 1974.
(SEAL)

Appendix "D"—Petition for Reconsideration and Order Staying Proceedings in the Court of Common Pleas of Blair County, Pennsylvania

ORDER.

NOW, this 21st day of September, A. D., 1972, after due consideration of the instant Petition and upon motion of Thomas G. Peoples, Jr., Esquire and Patrick E. O'Leary, Esquire, IT IS HEREBY ORDERED, DIRECTED AND DECREED that reconsideration of the exceptions to the Auditor's Report regarding the Estate of Gilbert F. Riley, deceased, shall be had and that new legal arguments will be heard by this Court on Oct. 27, 1972, at 9:30 o'clock in the forenoon.

IT IS FURTHER ORDERED, DIRECTED AND DECREED that all proceedings regarding the Estate of Gilbert F. Riley, deceased, including any distribution of assets of said Estate by the Executor, James G. Burke, are stayed pending hearing and disposition of new legal arguments presented at said hearing; a copy of this Order to be served upon said James G. Burke through John F. Sullivan, Esquire, Attorney for the Estate of Gilbert F. Riley, deceased.

BY THE COURT:

/s/ ROBERT C. HABERSTROH, *J.*

From the Record Certified:
21st day of Sept., 1972.
Vernon D. Weicht,
Prothonotary & Clerk of Courts.
(SEAL)